

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2009-0512
IN THE MATTER OF

EDDIE DUANE SMITH TRUST
MADERA TRANSPORTATION
305 NORTH 'E' STREET
MADERA, MADERA COUNTY

This Complaint is issued to the Eddie Duane Smith Trust pursuant to California Water Code (CWC) section 13350, which authorizes the imposition of Administrative Civil Liability (ACL), and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that the Eddie Duane Smith Trust violated provisions of Cleanup and Abatement Order (CAO) R5-2007-0726.

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds, with respect to the Eddie Duane Smith Trust's acts, or failure to act, the following:

DISCHARGER LIABILITY

1. On 19 September 2007, the Executive Officer of the Cantral Valley Water Board issued CAO R5-2007-0726 to the Eddie Duane Smith Trust, the Mildred R. Smith Trust, and Miguel P. Gonzalez, which required the investigation and cleanup of a release of petroleum hydrocarbon constituents. The release, which was first reported in July 1996, occurred from one underground storage tank (UST) at Madera Transportation, 305 North E Street, Madera, California, APN# 007-075-008 (Site).
2. An unauthorized release form was filed by the Madera County Environmental Health Department as required by CWC section 13272. Mildred Smith was identified as the responsible party. Ms. Smith, as the responsible party, applied for and was accepted into the State Water Resources Control Board's (State Board) UST Cleanup Fund (Cleanup Fund).
3. Mildred R. Smith passed away on 12 April 1999 and Eddie Duane Smith, as Ms. Smith's son and Successor Trustee of the Mildred R. Smith Trust, had the property transferred to the Eddie Duane Smith Trust on 20 May 1999.
4. Eddie Duane Smith as Trustee of the Eddie Duane Smith Trust sold the property to Miguel P. Gonzalez on 16 December 1999. As current owner of the Site which had a release that has not been investigated and cleaned up, Mr. Gonzalez is a responsible party. Mr. Gonzalez never owned or operated USTs at the Site and has expressed his willingness to assume the lead for the cleanup, including becoming responsible for working with the Cleanup Fund. Mr. Gonzalez is not named in this Complaint because his actions are not impeding the cleanup of the Site, unlike the inaction of the Eddie Duane Smith Trust.

BACKGROUND

5. Total petroleum hydrocarbons as gasoline (TPHg), toluene, ethylbenzene, and xylenes were detected as high as 5,100 milligrams per kilogram (mg/kg), 40 mg/kg, 63 mg/kg, and 660 mg/kg, respectively, in soil samples collected at depths of 14 to 18 feet during removal of the UST at the Site.
6. The Madera County Environmental Health Department (MCEHD), by letter dated 15 May 1996, notified Mildred Smith that she must assess the extent of the release. The requested work was not performed, and on 24 March 1997 the MCEHD referred the Site to the Central Valley Water Board for regulatory oversight.
7. Board staff, by letter dated 7 June 1997, requested that Mildred Smith submit a workplan to assess the extent of the release. A workplan to drill a single boring was submitted during June 1997. Board staff correspondence dated 20 November 1997 approved the workplan. The work proposed in the workplan was never performed.
8. Mildred Smith applied for reimbursement of investigative and cleanup costs with the Cleanup Fund. The Cleanup Fund issued a Letter of Commitment to Ms. Smith on 15 July 1997.
9. On 9 January 2001, Central Valley Water Board staff sent a letter to Mr. Gonzalez notifying him that the report of the investigation was overdue. Mr. Gonzalez replied by sending the address of the ED Smith Trust (sic) and indicated that mortgage payments were sent to said Trust (note that ED Smith Trust was misread as E O Smith Trust by Board staff and Board correspondence between January 2001 and March 2007 were addressed to E. O. Smith Trust).
10. On 19 January 2001, Central Valley Water Board staff sent a letter to the E. O. Smith Trust notifying the Trust that the report of the investigation was overdue. The letter also stated that Ms. Smith received a Letter of Commitment from the Cleanup Fund, and that her Estate may be eligible for reimbursement of investigation and cleanup costs. No response was received from Mr. Smith.
11. On 15 March 2001, Central Valley Water Board staff sent the E. O. Smith Trust a letter notifying the Trust that the report of the investigation was still overdue. The letter was sent via certified mail and signed for and received by "Ed Smith."
12. On 10 September 2002, Central Valley Water Board staff issued a letter to the E. O. Smith Trust that noted the report of the investigation was overdue and that failure to respond will result in formal enforcement action against the Estate of Mildred Smith. The letter was sent via certified mail and received by "Smith."
13. On 29 April 2003, Central Valley Water Board staff spoke with Steven R. Mortimer, attorney who represented Mr. Smith in the Estate of Mildred Smith. Mr. Mortimer was informed that the Estate of Mildred Smith was likely eligible for the Cleanup Fund but that the current

owners were not. Mr. Mortimer stated that he would try to contact Mr. Smith. In a follow-up call, Mr. Mortimer indicated that Mr. Smith had not returned his telephone calls.

14. Central Valley Water Board staff contacted Mr. Smith via telephone on 25 September 2003 and explained to him that the property at 305 E Street, Madera, formerly owned by his mother, his mother's Trust, and his Trust, had a gasoline release that needed to be investigated and remediated. Board staff explained that Mildred Smith's Estate is still a responsible party, and is likely still eligible for the Cleanup Fund. Mr. Smith claimed ignorance of the release. Board staff sent Mr. Smith copies of case related documents to the address provided by Mr. Smith, which was the same address previously used by Board staff to send documents to Mr. Smith. Mr. Smith was to contact Board staff after reviewing the documents, but did not.
15. On 9 August 2004, Central Valley Water Board staff sent the E. O. Smith Trust a letter noting that the report of the investigation of the release at the Site was overdue. The letter noted that Ms. Smith was accepted into the Cleanup Fund and her Estate should be eligible. The letter noted that the Cleanup Fund had started allowing the eligibility for funding to be assigned. A guidance document for assigning eligibility was attached to the letter. The letter required that Mr. Smith contact Board staff and inform it if he planned to investigate and cleanup the Site or assign eligibility to the Cleanup Fund to the new property owners. Mr. Smith did not respond.
16. On 16 March 2007, Central Valley Water Board staff sent to Mr. Eddie D. Smith, Successor Trustee, Mildred R. Smith Trust, and Mr. Miguel Gonzalez, a letter notifying them that the report of the investigation was overdue. The letter was sent via certified mail. The letter was received by a representative of Mr. Gonzalez. No confirmation of receipt of the letter was received from Mr. Smith. Neither party responded to the letter.
17. A Draft Cleanup and Abatement Order was mailed to Mr. Eddie D. Smith and Mr. Miguel Gonzalez on 22 August 2007. The Draft Order identified the Mildred R. Smith Trust, the Eddie Duane Smith Trust, and Miguel P. Gonzalez as responsible parties. Neither party responded to the Draft Order.
18. CAO R5-2007-0726 (Order) was issued by the Executive Officer and sent to the responsible parties on 19 September 2007. The Order was sent via certified mail to Mr. Gonzalez and was signed for by a representative of Mr. Gonzalez on 20 September 2007. The Order was sent via Federal Express to Mr. Smith. Federal Express documents that the Order was delivered to the addressed residence on 20 September 2007. The Order requires submittal of a Water Supply Well Survey and a Site Assessment Workplan by 26 November 2007, and a Site Assessment Report summarizing the investigation performed in accordance with the approved Workplan by 26 March 2008.
19. Central Valley Water Board staff contacted Mr. Smith via telephone on 2 October 2007. Mr. Smith claimed to have not received the Order, and that Mr. Gonzalez was to have taken care of the problem. Board staff explained to Mr. Smith that the problem had not been taken care of and that he (Mr. Smith) should have access to the Cleanup Fund but that the current owner did not. Mr. Smith agreed to sign for and accept a copy of the Order if we

would send him another copy. Board staff sent Mr. Smith a copy of the Order via certified mail on 2 October 2007. The copy of the Order was signed for and received by Mr. Smith on 9 October 2007.

20. Central Valley Water Board staff sent Mr. Smith and Mr. Gonzalez correspondence on 11 February 2008 notifying them that the Site Assessment Workplan and Water Supply Well Survey were overdue. Neither party responded.
21. Central Valley Water Board staff sent Mr. Gonzalez and Mr. Smith a letter dated 29 April 2008. The letter noted that three submittals required by the Order were overdue and requested that they submit any information they believe relevant to determining an appropriate administrative civil liability. The letter was received by a representative of Mr. Gonzalez on 1 May 2008 and by Mr. Smith on 2 May 2008. Neither party responded.

VIOLATIONS OF CLEANUP AND ABATEMENT ORDER R5-2007-0726

22. To date, the Eddie Duane Smith Trust has not complied with CAO R5-2007-0726 or any previous Central Valley Water Board staff directive, despite eligibility for reimbursement from the Cleanup Fund. As of 2 March 2009, the Eddie Duane Smith Trust has failed to perform the following tasks required in CAO R5-2007-0726.

- Required Action 2. ***“By 26 November 2007, submit the results of a water supply well survey within one-quarter mile of the Site and a sampling plan and time schedule subject to Executive Officer approval to sample any water supply well(s) threatened to be polluted by waste originating from the Site.”***

The water supply well survey has not been submitted.

- Required Action 5. ***“By 26 November 2007, submit a Site Assessment Workplan with the intent to collect a sufficient number of soil and groundwater samples to define the lateral and vertical extent of waste constituents in soil and groundwater and to better define their origin.”***

The workplan has not been submitted.

- Required Action 6. ***“By 26 March 2008, submit a Site Assessment Report (SAR) acceptable to the Executive Officer that summarizes the findings of the soil and groundwater investigation conducted in accordance with the approved workplan.”***

The report was to include recommendations and, if needed, a second work plan for additional investigation. If additional investigation was necessary, the second work plan was to include a time schedule for completing the work and submitting the results. The report has not been submitted.

23. In violation of CAO R5-2007-0726, the Eddie Duane Smith Trust has failed to and continues to fail to characterize the lateral and vertical extent of petroleum hydrocarbon impacts to soil

and groundwater, and has failed to and continues to fail to implement corrective action measures.

REGULATORY CONSIDERATIONS

24. By the acts and omissions cited above, the Eddie Duane Smith Trust has violated CAO R5-2007-0726, issued pursuant to CWC section 13304. CWC section 13304(a) states, in part::

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

25. CWC section 13350(a) states:

Any person who (1) violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

26. CWC section 13350(e) states, in part::

The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.

(B) When there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs.

27. CWC section 13350(f) states:

A regional board may not administratively impose civil liability in accordance with paragraph (1) of subdivision (e) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based upon specific factors required to be considered pursuant to Section 13327.

28. CWC section 13327 states:

In determining the amount of civil liability, the regional board . . . shall take into consideration the nature, circumstance, extent, and gravity of the violation or

violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.

29. As described in Finding 24, the Eddie Duane Smith Trust is in violation of requirements of CAO R5-2007-0726. As of 2 March 2009, the Eddie Duane Smith Trust has accrued, and is continuing to accrue, penalties for the following violations:
- a. Required Action 2, Submittal of Well Survey by 26 November 2007: 462 days late;
 - b. Required Action 5, Submittal of the Workplan by 26 November 2007: 462 days late; and
 - c. Required Action 6, Submittal of the Site Assessment Report by 26 March 2008: 341 days late.
30. As of 2 March 2009, the Eddie Duane Smith trust has accrued 1,265 days of violations for failing to perform separate and distinct required actions under CAO R5-2007-0726. Based on a statutory maximum penalty of \$5,000 per day per violation, the maximum liability for these 1,265 violations is six million, three hundred and twenty-five thousand dollars (\$6,325,000). Absent the Central Valley Water Board making express findings under CWC section 13350(f), the minimum liability under CWC section 13350 is one hundred twenty-six thousand five hundred dollars (\$126,500), calculated at \$100 per day per violation, multiplied by 1,265 days of violations.
31. The following was considered, pursuant to CWC section 13327, in determining the penalty amount charged in this Complaint:

Consideration	Evaluation
Nature, circumstance, extent, and gravity of the violation	The Discharger has totally disregarded the Central Valley Water Board's directives, which has resulted in a continuing threat to human health and the environment.
Whether the discharge is susceptible to cleanup or abatement	The violations of the Cleanup and Abatement Order allow a contamination plume to grow, complicating cleanup.
Degree of toxicity	The constituents mentioned in Finding 5 are highly toxic
Discharger's Ability to Pay	The Discharger has not demonstrated an inability to pay the assessed liability.
Effect of this Complaint on the Discharger's ability to stay in business	n/a
Voluntary Cleanup Efforts	The Discharger did not voluntarily participate in the cleanup of the Site, which was one of the primary reasons the Cleanup and Abatement Order was issued.

Consideration	Evaluation
Prior history of violations	The Discharger has disregarded almost all directives and requests issued by the Central Valley Water Board, despite numerous warnings.
Degree of culpability	Under the commitment from the State Board's Cleanup Fund, the Discharger has access to funds to cleanup the Site. By failing to utilize these available resources, the Discharger has increased its culpability.
Economic benefit or savings resulting from the violation	Minimal – due to the fact that costs could have been reimbursed.
Other matters as justice may require	Failure to comply with the Cleanup and Abatement Order has frustrated efforts by the current landowner to remediate the Site.

32. A \$126,500 Administrative Civil Liability is appropriate based upon the determinations in Findings 22, 29, 30 and 31, and is consistent with the State Board's Enforcement Policy.
33. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321.

THE EDDIE DUANE SMITH TRUST IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Eddie Duane Smith Trust be assessed an Administrative Civil Liability in the amount of **one hundred twenty-six thousand five hundred dollars (\$126,500)**. The amount of the liability proposed is based upon a review of the factors set forth in CWC section 13327, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be held at the Central Valley Water Board meeting scheduled on **11/12 June 2009**, unless the Eddie Duane Smith Trust agrees to either of the following by **22 April 2009**:
 - a. Waives the hearing by completing the attached form (checking off the box next to item #4) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **one hundred twenty-six thousand five hundred dollars (\$126,500)**; or
 - b. Agrees to enter into settlement discussions with the Central Valley Water Board and requests that any hearing on the matter be delayed by signing the enclosed waiver (checking off the box next to item #5) and returning it to the Central Valley Water Board along with a letter describing the issues to be discussed. Accepting this waiver is a discretionary action of the Central Valley Water Board.

3. If a hearing on this matter is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

*Original signed by: Lonnie M. Wass
for*

Pamela C. Creedon, Executive Officer

23 March 2009

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent the **Eddie Duane Smith Trust** (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2009-0512 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint; and
4. ☐ **(Check here if the Discharger will waive the hearing requirement and will pay the fine)**
 - a. I certify that the Discharger will remit payment for the civil liability imposed in the amount of **one hundred twenty-six thousand five hundred dollars (\$126,500)** by check that contains a reference to "ACL Complaint R5-2009-512" made payable to the "State Water Pollution Cleanup and Abatement Account." Payment must be received by the Central Valley Water Board by **22 April 2009** or this matter will be placed on the Central Valley Water Board's agenda for adoption as initially proposed in the Complaint.
 - b. I understand the payment of the above amount constitutes a settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period mandated by Federal regulations (40 CFR 123.27) expires. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. New information or comments include those submitted by personnel of the Central Valley Water Board who are not associated with the enforcement team's issuance of the Complaint.
 - c. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

5. ☐ **(Check here if the Discharger will waive the 90-day hearing requirement, but will not pay at the current time. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)** I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.
6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

(Print Name and Title)

(Signature)

(Date)

